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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1978

No. 79-23

ROBERT WORLEY,
Petitioner,

v.

DONALD H. WHALEY, CLARENCE T. HUNTER, SUZANNE HART, JOHN A. SCHICKER, JR., and MAYOR JAMES CONWAY Comprising the Board of Police Commissioners, St. Louis, Missouri,
Respondents.

PETITION FOR A WRIT OF CERTIORARI

To the Missouri Court of Appeals, Eastern District

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The petitioner Robert Worley respectfully prays that a Writ of Certiorari be issued to review the judgment and opinion of the Missouri Court of Appeals, Eastern Disrict, made final in the above-styled cause on April 10, 1979, which is the date of the denial of petitioner's Application for Transfer to Missouri Supreme Court after decision of the Missouri Court of Appeals, Eastern District entered January 30, 1979.

OPINION BELOW

The opinion of the Missouri Court of Appeals, not yet reported, appears in the Appendix hereto.

JURISDICTION

The judgment of the Missouri Court of Appeals, Eastern District, was entered on January 30, 1979, affirming the decision of the Circuit Court of the City of St. Louis, Missouri, Division No. 3, dated March 13, 1978. The Circuit Court had entered judgment against a petition for review of the decision of the Board of Police Commissioners, City of St. Louis, Missouri, dated October 31, 1977. The Court of Appeals denied a timely motion for rehearing or in the alternative for transfer to the Missouri Supreme Court on March 16, 1979. Thereafter, on April 10, 1979, the Supreme Court of Missouri denied an application for transfer. The jurisdiction of this Court is invoked under 28 U.S.C. §1257(3).

QUESTIONS PRESENTED

1. Whether the privilege against self-incrimination of the Fifth Amendment to the United States Constitution as incorporated through the Due Process Clause of the Fourteenth Amendment to the United States Constitution is a bar to the dismissal of a police officer who in violation of a command of a superior officer refuses to submit a statement of his official activities where he has been neither clearly advised of his Fifth Amendment privilege nor informed that his statement is for internal use only and will not be used in any subsequent criminal proceeding regardless of whether the statement is subsequently so used.

2. Whether disputed testimony that a police officer was advised of his Fifth Amendment privilege against compulsory self-incrimination and informed that a statement of his official duties was for internal use only and would not be used in any subsequent criminal investigation, constitutes competent and substantial evidence on the whole record that the police officer was afforded his constitutional rights.

3. Whether the privilege against compulsory self-incrimination of the Fifth Amendment to the United States Constitution as incorporated through the Due Process Clause of the Fourteenth Amendment to the United States Constitution is a bar to the dismissal of a police officer who is advised of his constitutional rights in an internal investigation and, then, in violation of a command of a superior officer, refuses to submit an internal statement concerning the performance of his official duties where contrary to the assurances of the superior officer, the statement ultimately may be used in a stage of a criminal proceeding against the police officer.

CONSTITUTIONAL PROVISION INVOLVED

1. The Fifth Amendment to the United States Constitution provides in pertinent part:

> "No person . . . shall be compelled in any criminal case to be a witness against himself . . ."

STATEMENT OF THE CASE

A. How Federal Questions Are Presented

Petitioner was stricken from the rolls of the St. Louis Metropolitan Police Department by order of the Board of Police Com-

missioners for violation of Rule 9, Section 9.001(b) of the Police Manual which requires that "All orders of a superior officer must be observed and obeyed." Petitioner filed a petition in the Circuit Court of the City of St. Louis, Missouri, seeking the Circuit Court to vacate the findings of the Police Board and to order that he be reinstated to duty on the ground that the Police Board's findings and order were unsupported by competent and substantial evidence on the whole record, a violation of his Fifth Amendment privilege against compulsory self-incrimination, and arbitrary and capricious in that the Police Board did not address the issue whether prior to his being ordered by a superior officer to make a statement, he was advised of his rights, (A.3,6-7).[1] On March 13, 1978, the Circuit Court affirmed the decision of the Police Board. The Circuit Court held that the disputed testimony that the petitioner had been read his rights regarding internal and criminal investigations was not devoid of probative force as to that issue and that petitioner's reliance on *Gardner v. Broderick*, 392 U.S. 273, and *Confederation of Police v. Conlisk*, 489 F.2d 891 (7th Cir. 1973), *cert. denied*, 416 U.S. 956 was unfounded (A.13). The Circuit Court also held that petitioner had not shown that the statement which he had been ordered to make would incriminate him or that assurances of a superior officer that the internal statement of a police officer would not be used in subsequent criminal proceedings against that officer were meaningless (A. 18-19).

On appeal to the Missouri Court of Appeals, Eastern District, petitioner filed a brief seeking to have the judgment of the Circuit Court reversed and set aside and have the Police Board ordered to reinstate him on the basis that (1) the Police Board's findings and decision were unsupported by competent and substantial evidence on the whole record, in that petitioner would not be

[1] "A" references are to the Transcript of Record on Appeal from the Circuit Court of the City of St. Louis, Missouri, Division No. 3.

disciplined for refusal to obey an order of a superior officer that he submit to the Police Department a statement of his official duties where he was not clearly advised of his constitutional rights, and (2) the Police Board's decision and order were a denial of his Fifth Amendment privilege against compulsory self-incrimination, in that he was discharged for exercising this right by refusing to make a statement to the Police Department which would have been used against him (B.7).[2] On January 30, 1979, the Court of Appeals affirmed the judgment of the Circuit Court. Regarding the disputed testimony that petitioner was advised of his rights, the Court of Appeals held that the Police Board "was empowered to believe whomsoever it chose" and "(petitioner's) admission of having read these (internal affairs) rights in the police manual is sufficient to charge him with knowledge." As to petitioner's assertion that the statement which the Police Department sought from him would have been used against him, the Court of Appeals held that this belief of petitioner was an assumption for which it could find no basis, and that it followed from this incorrect assumption that petitioner had "failed to make the requisite showing that the requested report would incriminate him." Also, the Court of Appeals deemed petitioner's reliance on *Gardner* and *Confederation of Police* to be unfounded.

In a Motion for Rehearing or in the Alternative for Transfer to Missouri Supreme Court filed in the Missouri Court of Appeals, Eastern District, petitioner asserted that the Court of Appeals incorrectly decided that there existed competent and substantial evidence on the whole record to support the Police Board's decision and that the Court of Appeals' erroneous decision denied police officers their Fifth Amendment privilege

[2] "B" references are to the Appellant's Brief in the Missouri Court of Appeals, Eastern District.

against compulsory self-incrimination and rendered meaningless the decisions in *Gardner* and *Confederation of Police* (C. 1-3).[3] On March 16, 1979, the Court of Appeals denied petitioner's motion (D).[4]

In an Application for Transfer to Missouri Supreme Court filed in the Missouri Supreme Court, petitioner stated that the grounds upon which the application for transfer was made was to obtain a determination of the applicability of the Fifth Amendment prohibition against compulsory self-incrimination where a statement is sought from a police officer in connection with administrative disciplinary proceedings regarding the performance of his official duties and the police officer is not clearly advised that the statement may be used subsequently in a criminal proceeding against him (E.2).[5] Petitioner also charged that the Court of Appeals incorrectly interpreted the decisions in *Gardner* and *Confederation of Police* which petitioner asserts stand for the principle:

> ". . . that prior to the time a police officer gives testimony or is required to make any internal statement in connection with a disciplinary proceeding as to official conduct, the officer *must* be advised that he is being questioned with respect only to an internal investigation and is not being questioned regarding a criminal investigation. . . ." (E.3).

On April 10, 1979, the Missouri Supreme Court entered an order denying petitioner's Application for Transfer (F).[6]

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[3] "C" references are to the Motion for Rehearing or in the Alternaive for Transfer to Missouri Supreme Court.

[4] "D" references are to the Memorandum from Clerk of the Missouri Court of Appeals, Eastern District, regarding Motions for Rehearing or Transfer (Rulings).

[5] "E" references are to the Application for Transfer to Missouri Supreme Court.

[6] "F" references are to the Order of the Supreme Court of Missouri.

B. Summary of Record of Police Board Hearing

This case arises directly from the investigation by the Internal Affairs Division of the Metropolitan St. Louis Police Department of an incident at U. S. Highway 40 and Vandeventer Avenue in the City of St. Louis, Missouri, on March 2, 1977, where two individuals were allegedly assaulted by unknown police officers. (Bd. Tr. 23).[7] As part of the investigation, the Internal Affairs Division attempted to obtain a variety of statements from police officers for both internal investigative purposes, as well as for purposes of investigating and preparing criminal charges. (Bd. Tr. 29). Subsequently, in April, 1977, Sergeant David Heath, an investigator in the Internal Affairs Division, testified before a Grand Jury looking into alleged police misconduct regarding this incident, and revealed information gathered during both the internal and criminal phases of the investigation. (Bd. Tr. 84). As a result of that Grand Jury proceeding, two officers who had given reports to the Internal Affairs Division were indicted. (Bd. Tr. 50).

Petitioner had been called before the Internal Affairs Division on March 21, 1977. (Bd. Tr. 23, 70). Sergeant Allen Wagner of the Internal Affairs Division, who was in charge of both the internal and criminal phases of the investigation, informed petitioner that he and Sergeant Heath might want to get a statement from the petitioner about the incident. They suggested that petitioner might want to obtain an attorney prior to making any statement. (Bd. Tr. 24). Petitioner testified that at no time was he advised that the statement sought from him was for internal purposes only and would not be used in any criminal prosecution against him. (Bd. Tr. 70). Nonetheless, he was aware that the office of the Circuit Attorney of St. Louis had threatened to initiate criminal prosecution against any officer

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[7] "Bd. Tr." references are to the Transcript of the Hearing Before the Board of Police Commissioners, City of St. Louis, Missouri.

who failed to make a report of his participation in and observation of the incident at U.S. Highway 40 and Vandeventer Avenue. (Bd. Tr. 67, 73-74). Specifically, petitioner testified that he had learned that the City Attorney had taken the position that any officer who had any information or had taken any part in the incident at U.S. Highway 40 and Vandeventer Avenue was liable to criminal charges that would be derived from the investigation, and also that criminal charges would arise from a police officer's failure to make a complete and accurate report of his involvement in the incident. (Bd. Tr. 73-74). Therefore, petitioner contacted his attorney and reappeared before Sergeants Wagner and Heath with counsel later the same day. (Bd. Tr. 24).

When at this subsequent meeting Sergeants Wagner and Heath indicated that they wanted petitioner to write a report expanding on the original report which he had made to his commanding officer following the incident, petitioner refused on the grounds of his Fifth Amendment privilege (Bd. Tr. 24-26). The sergeants then took petitioner before Captain Julian Boyd, Commander of Internal Affairs, who gave petitioner a direct order to prepare a report relating to the incident at U.S. Highway 40 and Vandeventer Avenue (Bd. Tr. 36). Petitioner told Captain Boyd that he was going to invoke his Fifth Amendment privilege against compulsory self-incrimination (Bd. Tr. 37-38). Captain Boyd admitted that he neither advised petitioner of his constitutional rights in an internal investigation nor informed him that the statement was sought only for purposes of internal investigation and would not be used in a criminal prosecution. Also, Captain Boyd did not know whether anyone else had advised petitioner of his rights (Br. Tr. 36). Sergeant Wagner recalled that he read to petitioner an Internal Affairs Advice of Rights Card only after Captain Boyd ordered petitioner to prepare a report and petitioner refused to do so on grounds of

the Fifth Amendment privilege (Bd. Tr. 26).[8] Sergeant Wagner is not certain that he read the advice of rights card to petitioner because he made no written notation that he had done so (Bd. Tr. 28, 30).

Petitioner was also taken before Major William E. Brown, Chief Deputy Inspector of Police, on the afternoon of March 21, 1977 (Bd. Tr. 39). When ordered by Major Brown to furnish a police report regarding the incident, petitioner again invoked his Fifth Amendment privilege (Bd. Tr. 40). At no time did Major Brown advise Appellant of his immunity from criminal prosecution based on information obtained under a direct order of a superior officer in an internal investigation (Bd. Tr. 40). Indeed, Major Brown requested the "report" because he desired to elicit additional probative facts from petitioner "to determine the truth or falsity of any charges that might be brought against (petitioner)." (Bd. Tr. 43-44). Regarding that report, Major Brown testified that his only order to petitioner was to make the report and he did not ask petitioner specific questions about the incident at U.S. Highway 40

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[8] The Internal Affairs Advice of Rights Card contains the statement:

> "I wish to advise you that you are being questioned as part of an official investigation of the Police Department. You will be asked questions specifically directed and narrowly related to the performance of your official duties or fitnes for office. You are entitled to all the rights and privileges guaranteed by the laws and the Constitution of this State and the Constitution of the United States, including the right not to be compeled to incriminate yourself.
>
> I further wish to advise you that if you refuse to testify or to answer questions relating to the performance of your official duties or fitness for duty, you will be subject to departmental charges which could result in your dismissal from the Police Department.
>
> If you do answer, neither your statement nor any other evidence which is gained by reason of such statement can be used against you in any subsequent criminal procedings.
> However, these statements may be used against you in relation to subsequent departmental charges."

and Vandeventer Avenue (Bd. Tr. 44-45).

Petitioner was suspended as a police officer for his refusal to obey a verbal order of Major Brown (Bd. Tr. 42). Subsequently, the Inspector of the St. Louis Metropolitan Police Department issued charges and specifications against petitioner alleging that the petitioner had violated Rule 9, Section 9.001 (b) of the Police Manual. An Administrative hearing was conducted and on October 31, 1977, the Police Board found petitioner guilty of violating Rule 9, Section 9.001 (b) and ordered that he be stricken from the rolls of the Police Department. The aforementioned civil proceedings followed.

REASONS FOR GRANTING THE WRIT

1. The Decision of the Missouri Court of Appeals, Eastern District, Conflicts With the Decisions of the United States Supreme Court and United States Courts of Appeals as to the Constitutional Rights of a Public Employee Who Is Ordered by a Superior to Make a Statement Relating to the Performance of His Official Duties.

The decision of the Missouri Court of Appeals, Eastern District, states that the cases of *Gardner v. Broderick*, 392 U.S. 273, and *Confederation of Police v. Conlisk*, 489 F2d 891 (7th Cir. 1973), *cert. denied* 416 U.S. 956 upon which petitioner relies are not in point in that these cases differ on their facts from the instant controversy. Also, the Court of Appeals states the "they (*Gardner* and *Confederation of Police*) recognize no Fifth Amendment privilege absolving a policeman from testifying in a disciplinary proceeding as to his official conduct." The decision of the Court of Appeals makes no mention of *Uniformed Sanitation Men Ass'n v. Commissioner of Sanitation*, 392 U.S. 280. These three cases are in point. The factual differences which they have with the instant controversy neither diminish the importance of the factual similarities which do exist nor lessen the scope of the constitutional prohibition in issue. Petitioner contends that these cases stand for the principle that as a condition precedent to seeking a statement from a police officer for purposes of conducting an internal investigation of that police officer's performance of his official duties, the police officer must be advised of his Fifth Amendment privilege against compulsory self-incrimination and informed that his statement is for internal use only and will not be used against him in any subsequent criminal prosecution. It follows from such a principle that if a police officer is not so advised, he can properly invoke his Fifth Amendment privilege without fear of incurring discipline from the police department for his refusal to make a statement regardless of whether the statement would have been used in any subsequent criminal proceeding against him.

In both *Gardner* and *Sanitation Men*, the public employees whose testimony was sought were advised of their Fifth Amendment privilege against compulsory self-incrimination. Specifically, in *Gardner*, a police officer appeared before a grand jury investigating alleged bribery and corruption of police officers and was informed that the grand jury proposed to examine him concerning the performance of his official duties. He was advised of his privilege against self-incrimination but was asked to sign a waiver of immunity after being told that he would be fired if he did not sign. The police officer refused, was given an administrative hearing, and was discharged for his refusal to sign the waiver.

This Court reversed the dismissal and held that the Fifth Amendment privilege against compulsory self-incrimination bars any attempt to coerce a waiver of the immunity on penalty of loss of employment. The Court noted that the police officer was not required to assume that he was being requested to do an idle act of no legal effect in being asked to sign a waiver of

immunity. Similarly, in the instant case, a police officer should not be required to assume that he is being requested to do an idle act of no legal effect in being asked to make a statement concerning the performance of his official duties when he is not informed of his Fifth Amendment privilege and told whether the statement is sought for use in internal or criminal proceedings. In dictum in *Gardner*, 392 U.S. at 278, this Court stated:

> "If appellant, a policeman, had refused to answer questions specifically, directly, and narrowly relating to the performance of his official duties, without being required to waive his immunity with respect to the use of his answer or the fruits thereof in a criminal prosecution of himself, *Garrity v. New Jersey, supra,* the privilege against self-incrimination would not have been a bar to his dismissal."

Sanitation Men is somewhat closer to the facts in the instant case. In *Sanitation Men,* certain city sanitation employees were called before the Commissioner of Investigation who was inquiring into allegations that employees were charging private citizens improper fees and diverting those fees to themselves. Each employee was told that his answers could be used against him in subsequent legal proceedings and that if he refused to testify in regard to his own official conduct or that of any city employee on the grounds of the Fifth Amendment, his employment and eligibility for other city employment would terminate pursuant to statute. Certain of these employees asserted their Fifth Amendment privilege against compulsory self-incrimination and refused to testify. A disciplinary hearing was held and these employees were dismissed on the ground that they refused to testify.

This Court held in *Sanitation Men,* 392 U.S. at 284, that "(these public employees) were entitled to remain silent because it was clear that New York was seeking, not merely an accounting of their use or abuse of their public trust, but testimony from their own lips which, despite the constitutional prohibition, could be used to prosecute them criminally." A conclusion similar to that drawn by the Court in *Sanitation Men* in its finding that the state had a dual purpose in seeking the testimony of public employees can be drawn from the facts in the instant controversy. At the time the Internal Affairs Division officers requested a statement from petitioner regarding the performance of his official duties, petitioner was aware that the Circuit Attorney's office had threatened to initiate criminal prosecution against any officer who failed to make a report of his participation in and observation of the incident that occurred at U.S. Highway 40 and Vandeventer Avenue (Bd. Tr. 67, 73-74). Major Brown himself acknowledged that he requested the statement from petitioner because he desired to elicit additional probative facts from petitioner "to determine the truth or falsity of any charges that might be brought against (petitioner)". (Bd. Tr. 43-44). Also, when Sergeant Heath testified before the Grand Jury investigating the incident at U.S. Highway 40 and Vandeventer Avenue he revealed information gathered during both the internal and criminal phases of the investigation (Bd. Tr. 84).

In dictum in *Sanitation Men,* 392 U.S. at 285, the Court further sketched an outline of the constitutional standards required when a public employee is confronted with an internal investigation of the performance of his official duties:

> "At the same time, petitioners, being public employees, subject themselves to dismissal if they refuse to account for their performance of their public trust, after proper proceedings which do not involve an attempt to coerce them to relinquish their constitutional rights."

The parameters of the "proper proceedings" after which a public employee may be dismissed for refusal to account for his official

duties are more concretely defined in the decisions of two United States Circuit Courts of Appeals which seek to apply various statements of this Court in the *Gardner* and *Sanitation Men* opinions. In *Uniform Sanitation Men Ass'n v. Commissioner of Sanitation*, 426 F.2d 619, 627 (2d Cir. 1970), *cert. denied* 406 U.S. 961, the Second Circuit Court of Appeals stated that "proper proceedings' are those "in which the employee is asked only pertinent questions about the performance of his duties and is duly advised of his options and the consequences of his choice." In *Confederation of Police*, 489 F.2d 891, 894, wherein police officers were suspended or discharged for involving the Fifth Amendment privilege against compulsory self-incrimination before a federal grand jury in violation of certain police department rules, the Seventh Circuit Court of Appeals said:

> ". . . the *Gardner* and *Uniformed Sanitation Men* decisions indicate that a public employer may discharge an employee for refusal to answer where the employer both asks specific questions relating to the employee's official duties and advises the employee of the consequences of his choice, *i.e.*, that failure to answer will result in dismissal but that answers he gives and fruits thereof cannot be used against him in criminal proceedings."

The Internal Affairs Division officers did not advise petitioner of the consequences of his choice in the instant case.

The Missouri Court of Appeals states in its opinion that the petitioner "failed to make the requisite showing that the requested report would incriminate him" and "It is axiomatic that the Fifth Amendment privilege is personal in nature and may not be invoked for the protection of others, as seemingly was attempted her." This Court in *Kastigar v. United States*, 406 U.S. 441, 444-445, *reh. denied* 408 U.S. 931 stated:

> ("The Fifth Amendment privilege against compulsory self-incrimination) can be asserted in any proceeding, civil or criminal, administrative or judicial, investigatory or adjudicatory; and it protects against any disclosures that the witness reasonably believes could be used in a criminal prosecution or could lead to other evidence that might be so used."

As noted hereinabove, the conduct of the Circuit Attorney's office and the Internal Affairs Division officers caused the petitioner to reasonably believe that use in a subsequent prosecution was the use intended for any statement which might be obtained from him. Also, if one of the hallmarks of an accounting of public trust, as compared to a criminal investigation, is notice to the public employee that his answers will not be used against him in a criminal proceeding, then the absence of such notice should be deemed as reasonable basis for a public employee's belief that the purpose of an order that he make a statement concerning the performance of his official duties is to obtain incriminating material for use in a criminal prosecution of him.

The scope of judicial review of administrative decisions as to findings of fact is limited, a finding of fact by an administrative body, affirmed by state courts, is conclusive upon the United States Supreme Court unless it is determined to be without support in the evidence, including any reasonable inference that may be drawn from the evidence, where the finding is related to a constitutional question involved in the controversy. *Ward & Gow v. Krinsky*, 259 U.S. 503. The apparent finding of fact by the Police Board that Sergeant Wagner read to petitioner an Internal Affairs Advice of Rights Card is not supported by competent and substantial evidence on the whole record.

The testimony of Sergeant Wagner that he read to petitioner the advice of rights card is disputed by petitioner (Bd. Tr. 70) and Sergeant Wagner himself is not certain that he read the advice or rights card to petitioner, because he made no written notation that he had done so (Bd. Tr. 28, 30). The Police Board in its decision, findings, and order neither found that petitioner was clearly advised and understood that a statement was sought only for internal proceedings nor addressed itself to this the only issue of fact in the case. The Police Board's decision stated in part that "(petitioner) was issued a direct verbal order by Major William E. Brown, . . . to prepare an additional report and to answer questions narrowly relating to the specific performance of (petitioner's) duties at the scene of an incident . . . (G. 2-3)."[9] At the hearing before the Police Board, Major Brown testified that he had ordered the petitioner to make a report, but admitted that he had not posed to petitioner any specific questions which he wanted the petitioner to respond to the report (Bd. Tr. 44-45). In fact, none of the Internal Affairs Division Officers testified that they had asked petitioner questions specifically, directly, and narrowly related to the performance of his official duties. Even if the Internal Affairs Division officers had conducted themselves in such a manner, for the Court of Appeals to say that petitioner was asked questions narrowly related to the specific performance of his duties does not meet the question whether petitioner was advised that the report was sought only for internal proceedings. The Police Department did not meet its burden of showing that the petitioner was afforded his constitutional rights. Sergeant Wagner's testimony that he recalled reading to petitioner the advice of rights card has no probative force on that issue.

[9] "G" references are to the Decision of the Board of Police Commissioners of the City of St. Louis, Missouri.

The controversy between the parties is not only over the fact whether Sergeant Wagner read to petitioner the advice of rights card, but is also over the constitutional significance to be attached to this issue of fact. It is to this latter element of the controversy that the decisions in *Gardner*, *Sanitation Men*, and *Confederation of Police* apply. The Court of Appeals said in its opinion that petitioner's admission of having read in the police manual, at the time he attended the police academy, the statement of internal rights that appears on the advice of rights card is sufficient to charge petitioner with knowledge of his internal rights at the time his superior officers ordered him to make a statement concerning the U.S. Highway 40 and Vandeventer Avenue incident. This complete disregard by the Court of Appeals for the decisions in *Gardner*, *Sanitation Men*, and *Confederation of Police* is unfounded. It is essential to the validity of the Police Board's decision that there is competent and substantial evidence on the whole record that the petitioner was advised of his Fifth Amendment privilege against compulsory self-incrimination and informed that a statement was sought from him purely for use in internal proceedings. There is no such competent and substantial evidence on the whole record.

The conflicts justify the grant of certiorari to review the judgment of the Missouri Court of Appeals, Eastern District.

2. **The Decision of the Missouri Court of Appeals Raises Problems That Are Significant, Recurring, and Common Concerning the Exercise of the Constitutional Privilege Against Compulsory Self-Incrimination by Police Officer, in Particular, and Public Employees, in General, in the Course of Investigations of the Performance of Their Official Duties.**

There are compelling reasons why a definitive guideline in the application of the Fifth Amendment prohibition against com-

pulsory self-incrimination in the context of internal investigations of public employees should be delineated by this Court. The interest at stake in the instant controversy is no less than the protection of the Fifth Amendment privilege against compulsory self-incrimination which is applicable to the states through the due process clause of the Fourteenth Amendment, *Malloy v. Hogan*, 378 U.S. 1. According to the Bureau of Labor Statistics. U.S. Department of Labor, 12,770,000 people were employed by state and local governments and 2,730,000 people were employed by the federal government in January, 1979. The number of people on government payrolls in January, 1979, amounted to 17.96 percent of all employees on non-agricultural payrolls at the time.[10] Since neither internal nor criminal investigations of police officers, in particular, and other public employees, in general, are rare occurrence, the resolution of the issues presented in petitioner's case has broad significance for both those employed in the public sector of the economy and those to whom they provide services. Public interest would seem to demand that the constitutional rights of those individuals who work in the public sector be as scrupulously protected as these public employees are required to protect the constitutional rights of the public which they serve.

The decision of the Missouri Court of Appeals states the *Gardner* and *Confederation of Police* are not in point but recognizes that the internal affairs rights as provided on the internal Affairs Advice of Rights Card and in the Police Manual are the basis of this case. The substance of the internal affairs rights and the necessity for a public employee to be aware of that substance when confronted with a internal investigation are grounded on the dictum in *Gardner* and *Sanitation Men*, 392 U.S. 280,

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[10] *U.S. Bureau of Labor Statistics, Dep't of Labor, Employment and Earnings*, Vol. 26, No. 4 (April, 1979).

that if a policeman or other public employee were ordered to answer questions specifically, directly, and narrowly related to the performance of his official duties on penalty of dismissal from public employment without being required to waive the immunity from use of his answers and the fruits thereof in a criminal prosecution of himself, the Fifth Amendment privilege would not be a bar to his dismissal. This dictum is the basis for the holdings in *Confederation of Police* and *Sanitation Men*, 426 F.2d 619, that after certain "proper proceedings" a public employee may be dismissed from employment for his refusal to account for the performance of his official duties. This Court should address these issues, and, thus, provide lower courts with constitutional standards rather than dictum regarding the application of the Fifth Amendment privilege to internal inevstigations of the performance by public employees of their official duties.

Dictum in *Gardner* and *Sanitation Men*, 392 U.S. 280, and the decisions in *Confederation of Police* and *Sanitation Men*, 426 F. 2d 619, indicate that public employees have different rights depending upon whether an internal or a criminal proceeding is conducted. The Internal Affairs Division of the St. Louis Metropolitan Police Department has a dual function: (1) investigate the department's police officers in regard to matters which are purely internal and involve violations of department rules and regulations without criminal overtone, and (2) conduct criminal investigations of police officers. As a consequence of this duality, police officers appearing before Internal Affairs Division officers have different rights depending upon which function the Internal Affairs Division officers are serving. Thus, even if a police officer is aware of his constitutional rights, he does not know which rights are applicable when an Internal Affairs Division officer orders that he make a statement regarding the performance of his official duties but does not tell him

whether the statement is sought for use in an internal or a criminal proceeding.

Although police officers are not required by the United States or the Missouri Constitution or by any federal or Missouri statute to guess whether their superior officers are seeking information from them for use in an internal investigation or criminal prosecution; they are compelled to make guesses rather than free and rational decisions when they are not advised of their constitutional rights. Thus, a public employee may incorrectly guess that a statement is sought from him for use in an internal proceeding and wrongfully forego his Fifth Amendment privilege against compulsory self-incrimination in the belief that by doing so he is saving his job or he may incorrectly guess that the statement is sought for use against him in a criminal proceeding and unjustly sacrifice his job in the belief that by doing so he is preventing some criminal prosecution against himself. In holding in *Garrity v. New Jersey*, 385 U.S. 493, 497, that statements obtained from police officers under the threat of removal from office, so as to induce them to forego their Fifth Amendment privilege, are the products of coercion and, therefore, cannot be used in subsequent criminal proceedings, this Court stated:

> "The choice given (the police officers) was either to forfeit their jobs or to incriminate themselves. The option to lose their means of livelihood or to pay the penalty of self-incrimination is the antithesis of free choice to speak out or to remain silent. That practice, like interrogation practices, we reveiwed in *Miranda v. Arizona*, 384 U.S. 436, 464-465, is 'likely to exert such pressure upon an individual as to disable him from making a free and rational choice.' "

Adding to the uncertainty of attempting to determine which function the Internal Affairs Division is pursuing when it seeks a statement from a police officer is the apparent lack of a set

procedure by Internal Affairs Division officers to advise a police officer of his constitutional rights and put him on notice as to the purpose for which the statement is sought. According to the sequence of events outlined in Sergeant Wagner's testimony at the Police Board hearing, he first ordered petitioner to make a statement, second he took petitioner before Captain Boyd, and third he may have read the advice of rights card to petitioner (Bd. Tr. 26). No practice such as permitting the police officer to read an advice of rights card himself or obtaining from the police officer a statement and his signature that he understands his rights was followed in petitioner's case.

The constitutional privilege against compulsory self-incrimination is not well protected when a city department recognizes that a statement of rights must be read to a public employee from whom an internal statement regarding his official duties is sought, but there is no set procedure for assuring that the rights are read and understood. There is little difference in being required by state constitution, state statute, or city department rule to waive the Fifth Amendment privilege on penalty of loss of employment, as in *Gardner, Sanitation Men*, 392 U.S. 280, and *Confederation of Police*, and being ordered to give a statement on penalty of loss of employment when the person so ordered, as in petitioner's case, is not advised when the statement is for use in an internal or criminal proceeding. In either case, the choice between the fear of being discharged for refusal to make a statement and the fear of self-incrimination if a statement is made is the product of duress.

Even if petitioner had been advised of his constitutional rights, such advice would have been inadequate to protect the constitutional privilege because internal statements given by other police officers in regard to the incident at U.S. Highway 40 and Vandeventer Avenue were used in a stage of a criminal proceeding

focusing on the activities of these same police officers who had made the internal statements. Sergeant Heath testified at the Police Board hearing into the incident that he obtained only internal statements from police officers Phillip Wasem and John Cullen since these officers refused to comment concerning the criminal investigation of the incident. Sergeant Heath further stated at the hearing that he advised Wasem and Cullen of their rights in an internal investigation and told them that their statements would not be used criminally (Bd. Tr. 54-56). A transcript of the April Term, 1977, Circuit Court Grand Jury Special Investigation, which was introduced into evidence at the Police Board hearing, shows that Sergeant Heath related to the Grand Jury the internal statements of both Wasem and Cullen (Bd. Tr. 83). At the time that Sergeant Heath revealed the contents of these internal statements to the Grand Jury, that body was investigating the possible criminal liability of those police officers, including Wasem and Cullen, who were involved in the incident. Thus, contrary to representations of Sergeant Heath, the internal statements of Wasem and Cullen were used during a stage of a criminal proceeding that was determining whether criminal prosecution of these two police officers as well as others should follow.

There is little difference in being required by state constitution, state statute, or city department rule to waive the Fifth Amendment privilege against compulsory self-incrimination on penalty of loss of employment, as in *Gardner, Sanitation Men,* 392 U.S. 280, and *Confederation of Police,* and being ordered to give an internal statement on penalty of loss and employment when the statement ultimately may be used in a criminal proceeding against the person who made the statement. A person cannot make a free and rational decision when the only available course of action is to choose between making an internal statement which subsequently might be used against him in a criminal proceeding or refusing to make such a statement on grounds of the Fifth Amendment privilege against compulsory self-incrimination and, as a result, be accused of refusing to obey a direct order, and run the risk of being discharged from employment.

The significant, recurring and common problems raised by the instant case justify the grant of certiorari to review the judgment of the Missouri Court of Appeals, Eastern District.

CONCLUSION

For these reasons, a Writ of Certiorari should issue to review the judgment and opinion of the Missouri Court of Appeals, Eastern District.

Respectfully submitted,

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Attorney for Petitioner

APPENDIX

EXHIBIT A

In the Missouri Court of Appeals
Eastern District
Division III

Robert Worley, Appellant, vs. Donald H. Whaley, et al., Comprising the Board of Police Commissioners, St. Louis, Missouri, Respondents.	No. 40,268 Appeal from the Circuit Court City of St. Louis Michael F. Godfrey, Judge Opinion Filed January 30, 1979

Plaintiff, Robert Worley, a former police officer, has appealed the trial court's judgment which upheld his dismissal by the defendant St. Louis Board of Police Commissioners (hereafter the "Board"). The Board dismissed plaintiff for disobeying its order that he file a report concerning a line-of-duty incident. Plaintiff declined to do so on the ground of self-incrimination. The Board's regulations provided, however, that plaintiff's answers could not be used to incriminate him.

Plaintiff's dismissal followed the Board's finding he had violated Rule 9, Section 9.001(b) of the Board's police manual, which provides that "(b) all orders of a superior must be observed and obeyed."

This case originated in the Board's investigation of an alleged assault by other police officers on two private citizens. Plaintiff had been summoned to the assault scene. Later, when the police department's Internal Affairs Division (IAD) began an investi-

gation, plaintiff was ordered to file a report concerning his knowledge of the incident. Plaintiff was then advised he could seek legal advice before making a statement, and he did so. Despite direct orders from his superiors defendant refused to file the report, asserting the Fifth Amendment.

Defendant had counsel at the hearing, held to determine whether he had wrongfully refused to obey a lawful order to file a report. Evidence conflicted as to whether plaintiff had been informed of his "Internal Affair Rights" by any of the officers conducting the investigation. Police Sergeant Wagner testified he thought he had read plaintiff his rights but could not be absolutely sure; he admitted the possibility that he had not. Plaintiff testified he had not been read his rights by anyone. Plaintiff admitted that he knew the nature of these rights, as contained in the Board's manual which he had studied while undergoing training at the police academy. These rights,[1] as pertinent here, provided that the inquiry was limited to the officer's official duties; that if he refused to answer relevant questions he could be dismissed; that *his answers could not be used against him* in subsequent criminal proceedings.

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[1] "I wish to advise you that you are being questioned as part of an official investigation of the Police Department. You will be asked questions specifically directed and narrowly related to the performance of your offical [sic] duties or fitness for office. You are entitled to all the rights and privileges guaranteed by the laws and the Constitution of this State and the Constitution of the United States, including the right not to be compelled to incriminate yourself.

"I further wish to advise you that if you refuse to testify or to answer questions relating to the performance of your official duty or fitness for duty, you will be subject to departmental charges which could result in your dismissal from the Police Department.

"If you do answer, neither your statement or any information or evidence which is gained by reason of such statement can be used against you in any subsequent criminal proceedings."

Plaintiff claims on appeal that the trial court erred in afirming the Board's decision in two respects: (1) Dismissal for failure to obey an order from a superior officer was improper when he had not been clearly advised of his constitutional rights, or that the statement was to be used for internal purposes only, and (2) dismissal for failure to obey an order to submit a written statement denied plaintiff his right against self-incrimination because it was, in effect, an order compelling him to forego his Fifth Amendment right.

Our function is to determine whether the Board's decision is supported by competent and substantial evidence, or whether it was so arbitrary as to be an abuse of discretion. Perez v. Webb, 533 SW2d 650 [3] (Mo.App. 1976); Century State Bank v. State Banking Board of Missouuri, 523 SW2d 856 [2, 3] (Mo. App. 1975). The evidence was conflicting. The Board, having the opportunity to weigh the testimony and observe the witnesses, was empowered to believe whomsoever it chose. Board of Education, Mt. Vernon Schools v. Shank, 542 SW2d 779 [5, 6] (Mo. banc 1976). McNeal, et al. v. Bequette, Mo. 39,746 (Mo.App. July 25, 1978). The Board was not obliged to believe plaintiff's self-serving statement about not knowing that by his requested statement he was immune from prosecution. His admission of having read these rights in the police manual is sufficient to charge him with knowledge. The effect of the trial court's judgment is to deny a police officer the power to shield himself from intra-departmental inquiry by invoking the Fifth Amendment privilege when he has been informed that such evidence would be inadmissible in any future criminal proceeding.

As to plaintiff's second contention, we believe he is wrongfully assuming that the information requested from him would be used against him later in derogation of his rights. We find no

basis for this assumption. Plaintiff had not been charged in any criminal proceeding, nor does he appear to have been so threatened, as he was only a potential witness to the incident and not himself involved.

It follows that plaintiff failed to make the requisite showing that the requested report would incriminate him. State ex rel. Caloia v. Weinstein, 525 SW2d 779 [4] (Mo.App. 1975). On the contrary, it seems his report would serve only to incriminate others. It is axiomatic that the Fifth Amendment privilege is personal in nature and may not be invoked for the protection of others, as seemingly was attempted here.

We note the importance each side attaches to the cases of Gardner v. Broderick, 392 US 273 (1968) and Confederation of Police v. Conlisk, 489 F.2d 891 (7th Cir. 1973). Neither case is in point since each differs on its facts. They recognize no Fifth Amendment privilege absolving a policeman from testifying in a disciplinary proceeding as to his official conduct.

We hold the Board's decision was not an abuse of discretion since it was based on competent and substantial evidence showing plaintiff violated a lawful order by refusing to report on a line-of-duty incident. In reaching that decision the Board did not violate plaintiff's constitutional rights.

Judgment affirmed.

James D. Clemons
Judge

James R. Reinhard
Presiding Judge
Concurs

George F. Gunn, Jr.
Judge
Concurs

MEMORANDUM

To: Attorneys of Record

From: Robert D. St. Vrain, Clerk
Missouri Court of Appeals
Eastern District

Re: Motions for Rehearing or Transfer (Rulings)

Date: March 16, 1979

The motions for rehearing and/or transfer to the Missouri Supreme Court in the following cases have all been denied as of today, March 16, 1979:

1. No. 38206 State v. Michael Edward Felton
2. No. 38891 & 38867 Patricia Ann Hill, et al. v. Gary Paul Barton, Deft./App. and Modern Department Store
3. No. 38863 State v. Billy Hamm
4. No. 38991 Pine Lawn Bank & Trust Company, et al. v. Milton J. Schnebelen, et al.
5. No. 39016 State v. Charles Lee Thomas
6. No. 39412 & 39835 W.B.M., a minor, by Y.S., h/n/f v. G.G.M.
7. No. 39443 Richard C. Ziebell v. Joyce E. Ziebell
8. No. 39653 & 39596 Henry Shannon v. St. Louis Board of Education, Employer, and Home Indemnity Company, Insurer

9. No. 39657 William Eldridge v. State

10. No. 39722 & 39740 State v. All Star News Agency

11. No. 39965 Hess Construction Company v. State Tax Commission of Missouri

12. No. 39982 William Gleason v. Public Safety Commission, City of Des Peres

13. No. 39986 John George Nero v. State

14. No. 39997 & 40454 State ex rel. Gerald Duane Garrett v. Hon. Milton Saitz

15. No. 40054 & 40405 St. Louis County Water Company v. Public Service Commission of the State of Missouri and Hazel Beaman v. James F. Conway, et al. (2 motions)

16. No. 40110 Earsel Larry Johnson v. State

17. No. 40229 James Robert Hooper v. State

18. *No. 40268 Robert Worley v. Donald H. Whaley, et al.*

19. No. 40343 Larry D. Gilmore v. State

RSV/ld

cc: Judges

EXHIBIT C

No. 61318

In the Supreme Court of Missouri
Eastern District No. 40268

January Session 1979

Robert Worley, Appellant,
vs.
Donald H. Whaley, et al., comprising
the Board of Police Commissioners,
St. Louis, Mo., Respondent.

TRANSFER

Now at this day, on consideration of appellant's application to transfer the above entitled cause from the Eastern District Court of Appeals, it is ordered that said application be, and the same is hereby denied.

STATE OF MISSOURI—SCT.

I, Thomas F. Simon, Clerk of the Supreme Court of the State of Missouri, certify that the foregoing is a full, true and complete transcript of the judgment of said Supreme Court, entered of record at the January Session thereof, 1979, and on the 10th day of April, 1979, in the above entitled cause.

Given under my hand and seal of said Court, at the City of Jefferson City, this 10 day of April, 1979.

Thomas F. Simon
Clerk

By Jan Gallamore
D.C.